Supreme Court, U.S.
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No. D 07-17

In the Supreme Court of the United States

STEPHEN B. KUZNETSOV,
Petitioner,

v.

NATIONAL CITY BANK OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Rooker-Feldman doctrine, as explained by this Court in Exxon Mobile Corp. v. Saudi Basic Indus. Corp., (Justice Ginsburg), 544 U.S. 280, (2005), preclude a federal district court from exercising subject matter jurisdiction to determine whether or not a prior state court judgment between the same parties, raised as a defense in the federal proceedings, is void ab initio on the face of the record for violating due process?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Stephen B. Kuznetsov is an individual resident and citizen of Pennsylvania.

Respondent, National City Bank of Pennsylvania, is a corporate subsidiary of National City Corporation, a publicly owned corporation with headquarters in Cleveland, Ohio and traded on the NYSE.

No other parties are involved.

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PETITION FOR A WRIT OF CERTIORARI

Stephen B. Kuznetsov ("Petitioner, Plaintiff, Appellant or Kuznetsov") respectfully petitions for a writ of certiorari to review the order of the U.S. Court of Appeals for the Third Circuit dismissing his appeal from the United States District Court for the Western District of Pennsylvania for lack of jurisdiction and imposing sanctions in the sum of $28,792.50.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Third Circuit, dated April 18, 2007 dismissing the appeal is unreported, and is reproduced as App. Exh. C, 5a. The order of the U.S. Court of Appeals dated May 14, 2007 denying rehearing is unreported, and is reproduced as App. Exh. A, 1a and its order of May 14, 2007 imposing sanctions is unreported and reproduced as App. Exh. B, 3a.

STATEMENT OF JURISDICTION

The orders of the U.S. Court of Appeals for the Third Circuit sought to be reviewed were entered April 18, 2007 and May 14, 2007. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 because it is filed within 90 days of the entry of the orders sought to be reviewed. This Court has jurisdiction to review the orders of the U.S. Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTION PROVISIONS INVOLVED

This case involves Article VI of the United States Constitution which provides in part,

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . ."

This case involves the due process clause of the Fifth Amendment to the United States Constitution, which provides, in relevant part "No person shall be . . . deprived of life, liberty or property without due process of law . . ."

This case also involves the Seventh Amendment of the Constitution which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTUTORY PROVISIONS INVOLVED

This case also involves 28 U.S.C. §1331 which provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

On April 26, 2006 Petitioner – Plaintiff - Appellant, Stephen B. Kuznetsov a non-compensated surety, filed a legal action (App. Exh. E, 16a) claiming jurisdiction under the federal Constitution in the United States District Court for

the Western District of Pennsylvania seeking damages for the breach of a written surety contract and the implied covenant of good faith and fair dealing in the performance of the contract. Paragraph 1 of the contract provided, "If Borrower at any time fails to fully and punctually pay or perform any of the Liabilities when due, the undersigned promises, jointly and severally to pay all such Liabilities immediately . . .".

In due course the borrower defaulted but Respondent Bank refused to permit Petitioner to pay the debt, which he attempted to do, and thereafter, the debt for which the surety was liable was increased from about $400,000.00 to $540,000.00 when judgment for non-payment was confessed against Petitioner and his wife.

The Respondent Bank moved to dismiss the case in the District Court or for summary judgment based upon a prior decision and judgment of the Pennsylvania Superior Court (an inferior court) in its favor in a case between the same parities. In that case Petitioner was denied the right to trial by a jury. In essence, the trial court granted the Bank's summary judgment motion and ruled that a surety, while under a duty to pay the debt upon default by the borrower, had no right to pay the debt because such right to do so was not expressed in writing. Also, Respondent was not subject to the implied covenant of good faith and fair dealing in the performance of the contract.

The trial courts denial of the right to trial by jury was appealed to the Pennsylvania Superior Court which affirmed the trial court's decision and thereafter the Pennsylvania Supreme Court (the state court of last resort), declined review.

In response to the Bank's motion to dismiss in the District Court, Petitioner challenged the validity of the prior judgment of the Superior Court contending that it was a nullity because the record on its face, as hereinafter explained, disclosed a violation of Petitioner's federal constitution right to due process.

The District Court granted Respondent's motion and dismissed the case for lack of subject matter jurisdiction but added that if it had jurisdiction it would dismiss the case as barred by res judicata.

Petitioner appealed to the Third Circuit Court of Appeals and before appeal briefs were filed Respondent moved to dismiss the appeal and for sanctions.

On April 18, 2007, a panel of three circuit judges, Barry, Ambro and Fisher granted Respondent's motion (App. Exh. C, 5a) based upon the Rooker-Feldman doctrine as explained in Exxon Mobile Corp. v. Saudi Basic Indus. Corp. 544 U.S. 280 (2005) and in addition, imposed sanctions on Petitioner of $28,792.50 deeming the suit frivolous (App. Exh. C, 5a and B, 3a).

Petitioner promptly filed a petition for rehearing on multiple grounds and requested that the Court's order be vacated, that the Court consider submitting the issue to the Court en banc because the panel's decision directly conflicted with a prior decision of Third Circuit, In Re James 940 F.2d 46 (3rd Cir. 1991). In that case Judge Aldisert explained that a federal district court has jurisdiction to determine whether a prior state judgment is void ab initio (as Petitioner contends), while it did not have jurisdiction to review and determine if the prior judgment was erroneous.

Petitioner also requested that because of the critical importance of comity with state courts, the Rooker-Feldman doctrine and Petitioner's federal constitution rights that the case be certified to this court for review in accordance with 28 USCS §1254(2).

On May 15, 2007 Petitioner's request for rehearing was denied (App. Exh. A 1a).

No federal constitution issues were raised or decided in the prior state lawsuit.

ARGUMENT FOR GRANTING THE PETITION

I.

DUE PROCESS, THE CONDUCT OF THE PENNSYLVANIA COURTS, DENIAL OF THE RIGHT TO TRIAL BY JURY AND JURISDICTION

The due process clause of the Fifth Amendment of the United States Constitution is sacred. States are bound by due process although the metes and bounds of due process may be somewhat indefinite and how to enforce such right in some cases less than certain. But, clearly due process precludes state judicial bias or other misconduct whether intentional or inadvertent. That is this case.

In Black's Law Dictionary (5th Edition) over a half page of fine print is devoted to explaining the term "due process" and in Douglas et al. v. City of Jeannette, PA., et al. 130 F.2d 652 (3rd Cir. 1942) Circuit Judge Maris at 656-659 discussed various aspects of due process and cited a number of cases illustrating its complications and indicating the possible difficulties in pleading a violation of due process.

Petitioner acknowledges he has the burden to prove jurisdiction in the federal court system, but contends such proof need not be fully set forth in the complaint. In this case in his complaint, Petitioner simply claimed jurisdiction under the Constitution and laws pertaining to national banks. Petitioner contends that where the case arises from the violation of due process, subject matter jurisdiction can be established by affidavits and other means. See Land v. Dollar 330 U.S. 731, 735 n.4, 67 S. Ct. 1009, 91 L.Ed. 1209 (1947); Bell v. Hood 327 U.S. 678, 66 S. Ct. 773, 775 n.1,2 (1946); and Int'l Assoc. of Machinists & Aerospace Workers v. Northwest Airlines 673 F.2d 700, 711 n. 5,6 (3rd Cir. 1982). In Petitioner's case, proof of jurisdiction is intertwined in documents of record and federal law controls the outcome of the case.

The case of Grun v. Pneumo Abex Corp. 163 F.3d 441, 423 (7th Cir. 1998) illustrates that even inadvertent conduct by a court can violate due process. In the Grun case, Grun failed to appear for his trial and his case was dismissed. He then moved under Fed. R. Civ. P. 60(b)(4) for relief but it was denied and he appealed.

On appeal the court noted that 60(b)(4) authorizes relief when the judgment is void. The court at 423 stated: ". . . A judgment may be deemed void if the court that rendered the judgment acted in a manner inconsistent with due process of law" (emphasis supplied) citing United States v. Indoor Cultivation Equipment from High Tech Indoor Garden Supply 55 F.3d 1311, 1316 (7th Cir. 1995).

From reviewing the record the court at 423 stated:

> Indeed, it is clear from the record that the district court inadvertently failed to notify either of the

> parties, either by telephone, mail or otherwise, that they had a trial date. Not surprisingly, it is also undisputed that neither party appeared for trial. It is also clear that Grun's failure to appear at trial formed the *sole basis* for the district court's September 14, 1993 dismissal of Grun's case. In its Order and Opinion denying Rule 60 relief, the district judge held that its dismissal order was not void because:
>
> [t]he court's order setting the trial date was in the court's file and computer docket between April 7, 1993, and September 14, 1993—the date of dismissal. Thus, Grun should have known the impeding trial date. Apparently, neither Grun nor his counsel bothered to examine the file during the five-month period.

Relying on the record in the district court, the trial courts reasoning was rejected by the court of appeals, the court at 424 stating:

> Grun's actions are not representative of the actions of a litigant deserving the harsh sanction of dismissal. The dismissal order is void under Rule 60(b)(4) because it denied Grun due process, and the district court should have granted Gurn's Rule 60 motion for relief from judgment.

Grun illustrates how a violation of due process can occur without intent to do so.

And in Pennsylvania, the Supreme Court of Pennsylvania in Di Bona, Adm. V. P.T.C. 356 Pa. 204, 51 A.2d 768 (1974) makes it clear that trial court judges are not immune from the law of due process and granted a new trial because

of various oral questions and comments made by the trial court judge during the trial that violated due process. The court at 216 stated:

> The rebukes thus administered by the trial judge were uncalled for and were made in ill-chosen language. Judges should never forget that "the first and most essential element in a jury trial is a wise, learned, impartial and competent judge". See Martin et al. v. Phila. Gardens, Inc., **348 Pa.232, 236, 35 A.2d 317,** and Com. V. Brown, **309 Pa.515, 521, 164 A. 726**. A litigant who is denied this "essential element" is deprived of "due process of law." (emphasis supplied)

Petitioner submits that the same standards should apply to all judges and certainly in this case, but unfortunately, in the Di Bona case, supra the court did not elaborate on how to apply its statement that the judge must be "wise, learned, impartial and competent". Query: Was it intended that a court's decision could be challenged on due process grounds because the judge was not learned or competent? What evidence would be admissible to prove that the judge was not learned or competent? Do erroneous judgments violate due process because the judge was not learned and competent?[1]

To illustrate the difficulty in possibly applying the Di Bona rule or test in this case, at page 14 of Superior Courts memo (App. Exh. F, 21a), the court stated:

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[1] In Pennsylvania those seeking positions as judges run for election as a member of a political party.

> "In conducting our review, [of the trial courts grant of summary judgment in favor of the Bank] we have assessed the record in the light most favorable to the Bank as the non-moving party" (emphasis supplied)

However, it is undeniable that the Bank was the moving party! The question arises whether the Di Bona rule should be applied to the foregoing statement to establish a violation of due process on the face of the record or, is that evidence that the Superior Court's decision was clearly erroneous for the failure to apply the law correctly and assess the record in the light most favorable to the Petitioner as the non-moving party? Or, does the admission that it reviewed the record in the light most favorable to the Bank indicate that the court was not impartial or wise, learned or competent?

The Tenth Circuit in V.T.A. v. Airco, Inc. 597 F.2d 220 (10th Cir. 1979) explained:

> . . . (void ness) ". . . may also arise if the court's action involves a plain usurpation of power"[fn10] or if the court has acted in a manner inconsistent with due process of law[fn11]. (footnotes omitted); Marshall v. Board of Ed., Bergenfield, N.J. 575 F.2d 417 (3rd Cir. 1978); National Labor Relations Board v. Ford Motor Co., 114 F.2d 905, 505, n. 1-4 (6th Cir. 1940) ("we may accept as fundamental, the axiom that a trial by a bias judge is not in conformity with due process of law" (citation omitted) Adamson v. C.I.R., 745 F.2d 541, 546 (9th Cir. 1984) (the "imperative judicial integrity").

Thus, while the scope of due process and the remedy in some cases may be uncertain, decisions do make it crystal

clear that judicial conduct in a state court proceeding may be "unfair", and if so, such conduct violates due process whether the conduct is inadvertent or intentional[2]. In the instant case, Petitioner submits that the conduct hereinafter cited was intentional or at the very least reveals bias or, if unintended, indicates that the court was not competent per Di Bona, supra.

II.

THE COURTS UNTRUE STATEMENT

To review the facts in this case, the important "hard evidence" against the Pennsylvania Superior Court Judges consists of two documents from the record, App. Exh. F, 21a and App. Exh. G, 23a and a case decision, App. Exh. H, 26a. The first is a short written statement in Superior Court's Memo[3] that is extremely important and the second, quotations from Petitioner's written appeal brief to Superior Court. A comparison of the documents reveals on the face of the record the court's statement was and is untrue and compels the conclusion that the court did not act in a fair and impartial manner in reviewing Petitioner's appeal.

In the court's memo affirming the trial court's ruling that Petitioner had no right to pay the debt when the borrower defaulted, the court stated at page 14:

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[2] In Montana v. United States 440 U.S. 147 (1979) footnote 11.[8b] states: "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation . . ."

[3] Superior Court invoked its Rule I.O.P. 65.37 so that the memo would not be reported and would not establish precedent; but do not all decisions establish precedent?

". . . None of the authorities upon which Appellant relies support his contrary position that he had a right to pay the debt."

Query: Is the foregoing statement true or false? What authorities cited by Petitioner was Superior Court referring to? None were identified. The court did not identify a single authority cited by Petitioner or otherwise comment with regard to such authorities and further, the court (like the trial court) failed to cite any authority to support the position that the surety did not have the right to pay the debt although under a duty to do so "immediately".

In fact, Petitioner's brief cited and quoted two cases that verified that a surety has the right to pay the debt immediately upon the borrower's default (App. Exh. G, 23 a). One of the citations, Smith v. Harry 91 Pa 119, 123 (1879) (App. Exh. H, 26a) was decided by the Pennsylvania Supreme Court and thus binding on the inferior Superior Court. As quoted in Petitioner's brief:

"That decree established the executor's personal responsibility and it was his duty to make immediate payment [to the heirs]. It fixed the liability of his sureties for an absolute debt, a sum certain, for which there was then a present right of action against them; and they were not obligated to wait until after the legalese formally demanded the money, or issued process for its collection, before moving to protect themselves. . . and neither reason nor law required them to suffer the debt to become swollen by interest and costs, before they paid it, on pain of being treated as mere volunteers . . . (Emphasis supplied)

Petitioner also cited and quoted Willis v. Davis 3 Minn. 17; 1859 WL 3051 Minn.

* * *

> . . . the relation of principal and surety is one involving the utmost good faith and confidence; and it is the duty of the principal and the creditor to carefully consider and protect the rights of the surety, in all their transactions relating to the debt; . . .

* * *

> A surety may, at any time, pay the debt to the creditor, and sue his principal at once, to reimburse himself . . .

* * *

> A surety has always the right to pay the debt of the principal, and when he does so, he becomes entitled to be subrogated to all rights of the creditor . . .

* * *

Until this case was decided the rule of law was clear – the surety, like anyone who owes a debt, has the right to protect himself when the debt for which he is liable becomes due; he has the right to pay the debt immediately and the creditor can not prevent payment or enlarge the debt (as was done here) by delaying the time for payment and add other charges for the alleged delay of the surety in making payment.

Despite the citations and quotations, none the less the Superior Court judges found for Respondent Bank and wrote:

> ". . . None of the authorities upon which Appellant relies support his contrary position that he had a right to pay the debt."

The foregoing statement is totally opposite the truth and most revealing and is of critical importance. The untrue statement is on the face of the record and raises an inference of distrust of the judges decision. The statement creates a false or misleading impression. If the three judges acted in good faith in performing their duties they could not avoid applying the rules explained in Smith v. Harry, supra[4] or at least to identify the decision and comment. Petitioner submits that Superior Court's untrue statement deceives the reader and is evidence of the violation of Petitioner's right to due process.

Further, Petitioner requested that the Supreme Court of Pennsylvania exercise its power and review the case and correct the decision but without any explanation the Supreme Court declined to do so; it would not even answer three simple questions:

> 1. Did Superior Court commit reversible error for failing to apply the principles of law set forth in Smith v. Harry, 91 Pa. 119, 123 (1879)?
>
> 2. Did Superior court commit reversible error in interpreting the Surety Agreement and Guaranty in favor of the Bank?

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[4] The failure to refer to Smith v. Harry, supra, could explain why the court invoked rule I.O.P. 65.37 so that the decision would not set a precedent.

3. Did Superior court commit reversible error in holding the Duty of Good Faith inapplicable?

The decision of the Supreme Court not to review the case ended Petitioner's opportunity in state court proceedings to prove the lower courts decision erroneous and to obtain a jury trial. Also, the failure of the Supreme Court to review implies that it approved Superior Courts decision in disregard of the law and that it would not set precedent, thus raising another suspicion. The conduct of the Supreme Court and statement by Superior Court proves that the state courts were not fair and impartial. The statement attempts to justify the decision against your Petitioner but such statement is itself untrue in at least two respects. First, Petitioner did in fact cite cases that supported his "right to pay" - position, the controlling issue on appeal and, second, Smith v. Harry, supra, decided by the Supreme Court, was right on point and should have been applied.

The untrue statement is on the face of the record and with regard to a critical issue and for that reason should enable Petitioner under 28 U.S.C. §1331 to challenge the validity of the judgment invoked by Respondent as a defense. Also, to have the judgment held void ab initio and to do so without requiring the district court to examine and resolve the merits of the judgment. The conduct of Superior Court is tantamount to obstruction of justice and the failure of the Pennsylvania Supreme Court to review the case denied Petitioner's right to trial by jury and compelled Petitioner to seek justice elsewhere - - - - in the federal district court for the violation of rights guaranteed by the Constitution. Pennsylvania has acknowledged that judgments can be void if the conduct of a judge violates due process and here the evidence of a violation is clear under both federal law and the law of Pennsylvania. Truth should matter.

III.

THE ROOKER – FELDMAN DOCTRINE AN EXCEPTION

In Exxon Mobile Corp. v. Saudi Basic Indus Corp. 544 U.S. 280 (2005) and other cases this court has explained the Rooker-Feldman doctrine and its application based upon the decisions in Rooker v. Fidelity Trust Co. 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman 460 U.S. 462 (1983) but never in a case similar to that of Petitioner. Petitioner acknowledges that at present the doctrine clearly prohibits federal district courts from exercising appellate jurisdiction to review the merits of a state judgment and to reverse or modify the judgment at the request of the plaintiff in the federal suit. However, it is believed that this Court has yet to answer whether district court's retain subject matter jurisdiction to review a prior state judgment asserted as a defense. The distinction between reviewing a decision for state court errors and voiding a judgment based on the face of the record for violating due process is critical. Application of the Rooker-Feldman doctrine should not restrict rights guaranteed by the Constitution and leave an aggrieve party without any meaningful recourse. There must be an exception.

The 3rd Circuit panel relied on the Rooker-Feldman doctrine to dismiss Petitioner's case but your Petitioner submits that was clear error. Petitioner was deprived of his right to trial by jury in the prior state proceedings because of improper conduct by Superior Court judges and the failure of the Pennsylvania Supreme Court to grant review of the case. Without doubt what Superior Court did clearly indicated its bias and prejudice and fairly raised an inference of distrust in its decision. Nonetheless, the 3rd Circuit panel considered

Superior Courts statement merely "[a rejection of] Appellant's legal argument[1]" (App. Exh. C, 5a) ignoring that the statement was untrue and further, the panel could not point to any citations in the record to support an argument that a surety has no right to pay, etc.

The panel also criticized Petitioner's choice of words characterizing the conduct of the responsible Superior Court Judges as unwarranted. To the contrary, Petitioner contends that he was and is entitled to select words from the English language that best describe the facts, even if uncomplimentary[5] to a judge or judges. Respondent Bank raised the issue of the state suit and Petitioner surely was and is entitled to a fair fight for rights guaranteed by the Constitution - due process and a trial by jury.

Petitioner did not request the district court to review the merits of the prior state judgment or seek damages caused by that judgment. And, Respondent could have avoided the issue by asserting other defenses instead of the prior judgment. Petitioner contends that the Rooker-Feldman doctrine is inapplicable because Petitioner should be entitled to prove the state judgment void ab initio when asserted as a defense.

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[5] While the use of lies by judges to support their decision may be rare it is not unheard of. On January 31, 2007 an article was published in the Pittsburgh Post-Gazette newspaper that "Retired Elizabeth District Judge Ernest L. Marranccini is scheduled to plead guilty to one count of obstruction of justice on March 15 in federal court for trying to instruct a witness to lie during a grand jury investigation."

Also, see In Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980) where the judge made a pre-trial agreement to decide in favor of one party and was caught.

Petitioners position is in keeping with the teaching of the Court of Appeals for the Third Circuit in the case of In Re James 940 F.2d 46 (3rd Cir. 1991). In that case the court recognized different attacks on judgments to prove such judgments void and that for one type of attack federal district courts lacked subject matter jurisdiction while for a different attack, to prove the judgment void ab initio, the district courts have jurisdiction. Speaking for the Court Judge Aldisert at page 52 explained:

> It bears emphasis to repeat that federal courts that are classed as inferior under Article III have the power to vacate only state court judgments that are considered void ab initio. Sound jurisprudential reasons underlie this concept. Because a void judgment is null and without effect, the vacating of such a judgment is merely a formality and does not intrude upon the notion of mutual respect in federal – state interests . . ."

In fact, the Pennsylvania Supreme Court has long recognized that judgments rendered by its courts can be void; hence, the validity of Pennsylvania judgments can be attack without offending comity. In Fourtees Co., v. Sterling Equipment Corporation 242 Pa. Super. 199, at 208, footnote 3 Superior Court explained:

> "3. It is of no importance that the judgment in the instant case has already gone to execution. A judgment which is defective on its face is a nullity and without legal effect. Hence, the passage of time, however great, does not enter into a consideration of its validity. *See Funds for Business Growth, Inc. v. Maraldo,* 443 Pa. 281 278 A.2d 922 (1971); *Sharp v. Valley Forge Medical Center*, 422 Pa. 124, 221 A.2d

185 (1966); *Haverford Township School District v. Herzog*, 314 Pa. 161, 171 A.455 (1934); *Pennsylvania Stave Company's Appeal*, 225 Pa. 178, 73A. 1107 (1909). Cf. *Wilber trust Co. v. Evans*, 192 Pa. Super. 417, 422, 161 A.2d 664 (1960); *Markeim-Chalmers-Ludington, Inc. v. Mead*, 140 Pa. Super. 490, 14 A2d 152 (1940).

Petitioner contends the 3rd Circuit panel in this case should not have ignored in Re James supra as well as the Di Bone and Fourtees cases, supra. Those cases clearly support Petitioner's right to attack the validity of the state court judgment as "void on its face". Judicial misconduct - intentional or inadvertent -violates due process and in this case the record shows on its face an untrue statement in the Superior Court memo that was critical to the outcome of the case.

This Court is requested to consider that your Petitioner restricted his attack to only the face of the record created under the control of Superior Court and that Petitioner had no right of discovery to uncover additional facts of possible great interest. (Possibly the reason for favoritism or prejudice could be discovered.) One does not expect an elected political judge to confess in writing to bias, prejudice or political influence in making a decision. One must search for clues. Considering the untruthfulness of Superior Court's statement both the District Court and the Court of Appeals should not have hesitated to immediately nullify the Superior Court judgment. Protection of a person's right to fair and impartial proceedings is guaranteed by the federal constitution and Article VI of the Constitution is binding on all State court judges. Due process controls the outcome of the case under 29 U.S.C. §1331 and assuming the state judgment nullified, Petitioner should then be permitted to proceed before a jury

to prove the case alleged in the complaint. Diversity of citizenship is not required when federal law is the controlling issue.

IV.

REASONS TO GRANT A WRIT OF CERTIORARI

Violating due process to deny the right to trial by jury could not be a more serious matter. This Court is requested to answer specifically whether a federal district court has subject matter jurisdiction to hear and decide whether the defense of res judicata based upon a prior state court judgment can be challenged as void ab initio when the face of the state court record reveals a significant irregularity in the state proceedings that offends due process. If a district court is precluded from hearing the matter, what is the aggrieved party to do?

At present a party who believes that his right to due process has been violated in state court proceedings is confronted with numerous obstacles to obtain relief in addition to the Rooker-Feldman doctrine. The difficulties start with the federal procedural rules. Fed. R. Civ. P. 60(b)(4) confirms the jurisdiction of a federal district court to decide a motion to void a judgment but Rules 7, 8 or 9 do not address the nature of a complaint to challenge a state court judgment as void ab initio and what must be alleged. Rule 8 provides that res judicata be plead as a defense. 28 U.S.C. §1331provides that district courts have jurisdiction to decide ". . . civil actions arising under the Constitution . . ." but how should the aggrieved party prove jurisdiction? Pleading Form 2(b) requires only a mere reference to the Constitution. The end object here is to obtain a trial by jury improperly denied by a state court, but the controlling issue to obtain the

trial is one of federal law and your Petitioner contends that 28 U.S.C. § 1331 should be interpreted to permit a challenge to the validity of a prior state court judgment as attempted by Petitioner in this case.

The question arises; what is more important - the guaranty to individuals of due process for their protection or protecting state judges from scrutiny in their decision making process? State judges are not above the law and their wrong doing should not be swept under the rug.

Petitioner contends that if there is any evidence suggesting judicial misconduct in state court proceedings the judgment complained of should be automatically nullified and the aggrieved party entitled to proceed with his case in a federal district court. Otherwise the Rooker-Feldman doctrine renders due process worthless; it does not protect a litigant and it does not discourage judicial abuse but protects wrong doing as this case illustrates.

Petitioner contends the door to justice in federal courts must at all times remain open despite comity with state courts. The right to due process and trial by jury are sacred and one of the reasons the war for independence was fought! The court of last resort in Pennsylvania would not answer the simplest question of whether its decision in Smith v. Harry, supra. was still good law! What was your Petitioner to do?

Finally, please note that your Petitioner was sanctioned $28,792.50 for simply trying to obtain a trial by jury - his ultimate goal and, Petitioner submits, the sanction was and is unwarranted. The issues are justicable and sanctions violate the general American rule that parties to litigation pay their own attorneys' fees. Also, in the prior history judgment was confessed against Petitioner and his wife for about

$140,000.00 more than the debt when it first became due and Petitioner attempted to pay the debt; hence the question, "Hasn't Petitioner been overly punished?

Your Petitioner requests that the orders of the Court of Appeals for the Third Circuit be reversed and the case remanded to the District Court to conduct a trial by jury of the allegations in Petitioner's complaint. In the alternative, this court is requested to exercise its discretion and review the state court judgment on its merits. There are a number of reasons why it is clearly erroneous. For example, Superior Court failed to even discuss and give meaning to ¶1 of the surety contract which required Petitioner to pay the debt immediately and it, "assessed the record in the light most favorable to the Bank . . .". Also, it excused Respondent from the obligation to act in good faith and deal fairly in the performance of the contract.

The issues of jurisdiction, due process and the right to trial by jury are of nationwide importance and, does not due process command full review by this Court? Plaintiff contends that the Rooker-Feldman doctrine was not intended to deprive federal district courts from entertaining and deciding whether a state judgment is void ab initio; however, the question was not answered in either the Rooker-Feldman cases or the Exxon Mobile case.

Respectfully submitted,

Raymond G. Hasley, Pa. Id. 1231
Counsel of Record
9800B McKnight Road, Suite 115
Pittsburgh, PA 15237
(412) 366-6200

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1462

[Filed May 14, 2007]

Stephen B. Kunetsov, Appellant	)
	)
V.	)
	)
National City Bank of PA	)
	)

(Western District of Pennsylvania(Pittsburgh)
D.C .#06-cv-005 51)

Present: SCIRICA, Chief Judge SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

SUR PETITION FOR EN BA NC REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing b the court en banc, the petition for rehearing is DENIED.

By the Court,
/s/ Thomas L. Ambro, Circuit Judge

Dated: May 14, 2007
CLW/cc: Raymond G. Hasley, Esq.
David J. Porter, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1462

[Filed May 14, 2007]

Stephen B. Kuznetsov, Appellant	)
	)
V.	)
	)
National City Bank of Pennsylvania	)
	)

(Western District of Pennsylvania
(Pittsburgh)D.C .#06-CV-005 51)

Present: BARRY, AMBRO, and FISHER, Circuit Judges

1. Affidavit of David J. Porter, Esq. in Support Motion for Sanctions.

/s/ Carmella L. Wells
Carmella L. Wells 267-299-4928
Case Manager

See DCO-80

ORDER

On April 18, 2007, we granted National City Bank of Philadelphia's ("the Bank") Motion to Dismiss and determined that the appeal by Stephen B. Kuznetsov was frivolous. Pursuant to Federal Rule of Appellate Procedure 38 we awarded the Bank sanctions in an amount up to $28,792.50 representing its claimed attorney fees. That award was contingent on the filing of an affidavit and exhibits demonstrating *bona fide*, lawsuit-related expenses. The Bank has now filed an affidavit and also requests an additional $7,113.00 for expenses incurred after the filing of its motion on March 5, 2007. Upon review of the Bank's submission, we find it to be essentially in order. We thus award $28,792.50 in attorney fees as sanctions, but deny the request for additional fees.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: May 14, 2007
CLW/cc: Raymond G. Hasley, Esq.
David J. Porter, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1462

[April 18, 2007]

Stephen B. Kunetsov, Appellant	)
	)
v.	)
	)
National City Bank of PA	)
	)

Western District of Pennsylvania
(Pittsburgh) D.C.
#06-cv-00551

March 19, 2007
DCO-80

Present: BARRY, AMBRO, and FISHER, Circuit Judges

1. Motion by Appellee, National City Bank of PA to Dismiss Appeal and for Sanctions.

2. Response by Appellant in Opposition.

3. Reply by Appellee to Appellant's Response in Opposition.

4. Letter dated 3/26/07 Construed as a Motion by Appellant to File Response to Appellee's Reply to Appellant's Response to Motion to Dismiss Appeal.

5. Response in Opposition by Appellee to Motion by Appellant to File Response to Appellee's Reply to Appellant's Response.

6. Supplemental response by Appellant in opposition to Appellee's motion to dismiss and for sanctions and Appellant's objection to Appellee's exhibit D

/s/
Carmella L. Wells 267-299-4928
Case Manager

ORDER

The foregoing Motion by Appellant to File Response to Appellee's Reply to Appellant's Response to Motion to Dismiss Appeal is DENIED. All subsequent filings are likewise rejected. The foregoing Motion by Appellee to Dismiss Appeal and for Sanctions is GRANTED. This case is dismissed for lack of jurisdiction. *See Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (explaining the holdings of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), together known as the *Rooker-Feldman* doctrine, to bar "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments"). Moreover, even if jurisdiction were proper, the underlying issue raised in this case (now inartfully recast as

a due process violation) was fully litigated in the Pennsylvania state courts and its resolution there plainly would be *res judicata* here. *See Allen v. McCurry,* 449 U.S. 90, 94 (1980). The Court, therefore, deems this appeal to be frivolous. *See also* Appellant's Resp. ¶¶ 1, 2, 13 (accusing Pennsylvania Superior Court judges of "lying and other misconduct" merely for rejecting Appellant's legal argument[1]). Pursuant to Federal Rule of Appellate Procedure 38, sanctions in an amount up to $28,792.50, as requested by the Appellee, will be awarded contingent on the Court's review of a sworn affidavit and supporting exhibits showing *bona fide,* lawsuit-related expenses. Such affidavit and exhibits are to be filed within 10 days of this order.

By the Court,

/s/Thomas L. Ambro, Circuit Judge

Dated: April 18, 2007
CLW/cc: Raymond G. Hasley, Esq.
Daivd J. Porter, Esq.

A True Copy

/s/
Marcia M. Waldron, Clerk

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[1] This is to say nothing of the ethical impropriety in advancing such an argument. It is decidedly out of bounds for lawyers practicing before our Court to transform disagreements over the law into bald allegations about a judge's integrity. *See* MODEL RULES OF PROF'L CONDUCT R. 8.2(a).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 06-551

[Filed January 16, 2007]

STEPHEN B. KUZNETSOV, Plaintiff,	)
-vs-	)
NATIONAL CITY BANK OF PENNSYLVANIA, a corporation, Defendant.	)

AMBROSE, Chief U. S. District Judge.

OPINION and ORDER OF COURT

SYNOPSIS

The parties have been involved in years of litigation relating to a Surety and Guaranty Agreement. Defendant seeks the dismissal of this action based upon both lack of subject matter jurisdiction and claim preclusion. I agree that neither the United States Constitution nor "national banking

laws" give me subject matter jurisdiction over what are essentially claims for breach of contract and breach of the duty of good faith and fair dealing. Additionally, I agree with the Defendant that even if I were able to exercise subject matter jurisdiction, Plaintiff's claims would be barred by the doctrine of res judicata. The Motion to Dismiss is granted.

OPINION

Plaintiff Stephen Kuznetsov ("Kuznetsov") was founder and chief executive officer of PSM Technologies, Inc. ("PSM"). In 1988, Kuznetsov and his wife agreed to serve as sureties and guarantors on a loan to PSM in the amount of $900,000.00 from Equibank, Defendant National City Bank of Pennsylvania's ("the Bank") predecessor-in-interest. Ultimately PSM defaulted on the loan and went into bankruptcy. During bankruptcy proceedings, the Bank sold its claim against PSM to Kovalchick Corporation and assigned its contractual rights under the Surety and Guaranty Agreement ("the Agreement") to Kovalchick. Kovalchick eventually confessed judgment against PSM on the promissory note and against Kuznetsov on the personal guaranty.

In 2001, Kuznetsov then filed suit in the Court of Common Pleas of Allegheny County, Pennsylvania against the Bank, Kovalchick Corporation and Joseph Kovalchick.[1] As against the Bank, Kuznetsov claimed that it had breached the Agreement and breached its duty of good faith and fair dealing by selling the PSM loan to Kovalchick instead of to him. The trial court eventually granted summary judgment in favor of the Bank.

---

[1] Kuznetsov eventually settled his claims with Kovalchick Corporation and Kovalchick.

Kuznetsov appealed to the Superior Court of Pennsylvania. Again, Kuznetsov argued on appeal that he had a "right to pay" as surety and that the Bank's refusal to allow him to repay constituted a material breach of the Agreement. The Superior Court rejected Kuznetsov's arguments and affirmed the grant of summary judgment. Undeterred, Kuznetsov filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied the Petition. Kuznetsov subsequently filed an Application for Reconsideration of Denial of Allowance of Appeal. The Pennsylvania Supreme Court denied this Application as well.

On April 26, 2006, Kuznetsov then initiated this action against the Bank. In the Complaint, though Kuznetsov does not reference the extensive litigation history between the parties, he does reference the Agreement. Specifically, he contends that the Agreement gave him the right to immediately repay the loan in the event that PSM defaulted. *See* Complaint, ¶ 4. According to Kuznetsov, when the Bank refused to permit Kuznetsov to repay the defaulted loan, it not only breached the Agreement but it breached the duty to act in good faith.

The Bank has filed a Motion to Dismiss and/or Motion for Summary Judgment. *See* Docket No. 3.[2] According to the

---

[2] Though both parties have submitted numerous exhibits in conjunction with the pending Motion, I will still consider it a Motion to Dismiss. The exhibits consist of motions, briefs and opinions which were filed in the state court litigation and which constitute public records. In evaluating a motion to dismiss, I am permitted to consider public records. *See Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006), *citing*, Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* Section 1357 (3d ed. 2004).

Bank, this Court lacks subject matter jurisdiction over the matters raised in the Complaint. In the alternative, the Bank argues, Kuznetsov's claims are barred under the doctrine of res judicata. After careful consideration, and for the reasons set forth below, the Motion to Dismiss is granted.

STANDARD OF REVIEW

In deciding a Motion to Dismiss, all factual allegations, and all reasonable inferences therefrom, must be accepted as true and viewed in a light most favorable to the plaintiff. *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 666 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1988). I may dismiss a complaint only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In ruling on a motion for failure to state a claim, I must look to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide the defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666.

While a court will accept well-pleaded allegations as true for the purposes of the motion, it will not accept legal or unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27 n.2 (1977). Moreover, the plaintiff must set forth sufficient information to outline the elements of his claims or to permit inferences to be drawn that these elements exist. *See* Fed. R. Civ. P. 8(2)(a) and *Conley*, 355 U.S. at 45-46. Matters outside the pleadings should not be considered. This includes "any written or oral evidence in support of or opposition to the pleadings that provides some substantiation for and does not merely reiterate what is said in the pleadings." Charles A.

Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1366 (West 1990).

ANALYSIS

1. Subject Matter Jurisdiction

The Bank challenges the existence of subject matter jurisdiction over Kuznetsov's claims. "The plaintiff always bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction." *Doe v. Goldstein's Deli*, 82 Fed. Appx. 773, 775 (3d Cir. 2003), *citing*, *Gould Electronics, Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). In the Complaint, Kuznetsov alleges that "[j]urisdiction is based upon the U.S. Constitution and laws pertaining to national banks." *See* Complaint, ¶ 3. Nothing in the Complaint suggests the assertion of a constitutional claim. Nor does Kuznetsov invoke a "national banking law." Indeed, the claims asserted appear to be nothing more than for breach of contract and breach of the duty of good faith and fair dealing. Both claims are state law claims and would not support the exercise of federal jurisdiction.

In his Response in Opposition to Defendant's Motion to Dismiss and/or Motion for Summary Judgment (*See* Docket No. 15), Kuznetsov states that:

> This court has subject matter jurisdiction. The Bank is a national bank organized under federal law and subject to the jurisdiction of federal courts. 12 U.S.C.A. § 24 provides:
>
> > **Fourth**: to sue and be sued, complain and defend, in any court of law and equity, as fully

> as natural persons." [sic] as a national bank, Defendant is subject to state law, *See South Dakota v. National Bank of South Dakota*, 219 F. Supp. 842, affirmed 335 F.2d 444, *certiorari denied* 85 S. Ct. 667, 379 U.S. 970, 13 L. Ed. 2d 562.

See Docket No. 15, p. 3. I find Kuznetsov's reference to 12 U.S.C.A. § 24 to be unconvincing. Section 24 does not grant federal subject matter jurisdiction. Rather, it grants a bank the same *capacity* to sue and be sued as a natural person. Simply stated, Kuznetsov has not demonstrated that his Complaint gives rise to a claim arising under the Constitution, laws or treaties of the United States. Nor is there any indication that diversity jurisdiction would exist. As such, the Motion to Dismiss must be granted for lack of subject matter jurisdiction.

2. Res Judicata

Assuming, arguendo, that I could exercise subject matter jurisdiction, I turn to the Bank's argument regarding res judicata or claim preclusion. Generally, "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, (1980). To apply res judicata, a federal court looks to the preclusion law of the state in which the judgment was entered. *See Rose v. City of Allentown*, Civ. No. 5-5319, 2007 WL 30834 at *3 (3d Cir. Jan. 5, 2007), *citing*, *McNasby v. Crown Cork & Seal Co., Inc.*, 888 F.2d 270, 276 (3d Cir. 1989). The Third Circuit court recently observed that, in Pennsylvania:

> Res judicata bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

Rose, 2007 WL 30834 at *3, *quoting*, *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 669 A.2d 309, 313 (Pa. 1995). Having reviewed the voluminous records from the parties' state court proceedings, it is clear that Kuznetsov's claims raised in the federal complaint are barred by res judicata. Both the federal litigation and the state litigation involve Kuznetsov's alleged right under the Agreement to repay the outstanding loan; both suits involve the same parties; the state courts acted within their jurisdiction and the state court judgment was undoubtedly final. Indeed, Kuznetsov does not even dispute that these factors are satisfied.

Instead, Kuznetsov contends that the doctrine of res judicata is inapplicable because the state court judgment is somehow "void" given the Superior Court's violation of his due process rights. Specifically, Kuznetsov contends that the Superior Court violated his due process rights when it read his claim on appeal to be based solely on § 205 of the Restatement (Second) of Contracts, rather than as also encompassing the terms of the Agreement; when it construed the facts in favor of the Bank on the motion for summary judgment, when the Bank was the moving party; and when it misinterpreted and misapplied the relevant case law. In short, review of Kunetsov's submissions convinces me that, though he uses other phrases, his complaint here is nothing more than

that the Superior Court's decision is erroneous. As Kuznetsov himself acknowledges, however, a judgment is not void merely because it is erroneous. *See* Docket No. 20, p. 5 and citations set forth therein. Such an argument does not defeat application of the doctrine of res judicata.

ORDER OF COURT

THEREFORE, this **16th** day of January, 2007, for the reasons set forth in the accompanying Opinion, it is Ordered that the Defendant's Motion to Dismiss and/or Motion for Summary Judgment (Docket No. 3) is GRANTED. By way of further Order, the Defendant's Motion for Sanctions Pursuant to Rule 11 (Docket No. 21) is DENIED. Much of the Defendant's Brief in Support of Sanctions is devoted to Plaintiff's and his counsel's conduct before the Pennsylvania Courts. I decline to award sanctions for representations made to other courts. Certainly Plaintiff's and his counsel's failure to mention the history of prior litigation in the federal complaint and the vague reference to federal jurisdiction causes me some concern, but I am not convinced that such actions warrant the imposition of sanctions. It is further Ordered that Judgment is entered in favor of Defendant and against Plaintiff. This case is closed forthwith.

BY THE COURT:

/S/
Donetta W. Ambrose
Chief U. S. District Judge

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

CIVIL ACTION CASE NO. __

[Filed April 26, 2006]

STEPHEN B. KUZNETSOV Plaintiff,	)
vs.	)
NATIONAL CITY BANK OF PENNSYLVANIA, a corporation Defendant	)

TRIAL BY JURY DEMANDED

COMPLAINT

1. Stephen B. Kuznetsov is a citizen of Pennsylvania and resident of Allegheny County, and at all times material a customer of defendant Bank.

2. National City Bank of Pennsylvania (Bank) is a corporation organized and doing business in accordance with federal banking laws with headquarter offices in Pittsburgh.

3. Jurisdiction is based upon the U.S. Constitution and laws pertaining to national banks.

4. On or about July 25, 1988, Kuznetsov agreed to serve as surety and to guaranty the re-payment of a $900,000 loan made by Equibank to PSM Technologies, Inc. (PSM) and he executed a written contract submitted to him by the lender a copy of which is attached as Exhibit 1 and hereinafter referred to as the surety contract or agreement. The contract obligated him and gave him the right to immediately perform the obligations of PSM should it fail to make payments as required. The loan was secured by collateral owned by PSM appraised at about ten million dollars. The surety contract executed by Kuznetsov and Equibank's secured interest in the collateral were later acquired by defendant Bank.

5. Disputes arose between PSM and Kuznetsov which were compromised and settled in court proceedings with the settlement approved by the Court, Under the terms of the settlement Kuznetsov was to receive a payment from PSM equal to about 47% of all of PSM's assets and to secure payment to Kuznetsov PSM granted Kuznetsov a secured interest in all of the assets of PSM, including some of the same assets that secured repayment of the loan to the Bank and also secured Kuznetsov as surety. The Bank did not object to the arrangement.

6. In due course PSM failed to perform both its obligations to pay Kuzentsov and the Bank and Kuznetsov, to protect both his equitable and secured interests in PSM's assets, attempted to perform his contractual obligations as PSM's surety, that is, to pay the Bank the outstanding balance of approximately $400,000 due on PSM's loan. However, acting in bad faith, the Bank breached the terms of the surety contract, particularly paragraph number 1, and refused to permit

Kuznetsov to perform his contractual obligation to repay the loan in place of PSM.

7. In addition to the Bank's breach of the expressed and implied terms of the surety contract, and unknown to Kuznetsov at the time, the Bank participated in and/or cooperated in one or more secret deals or schemes with others to defeat Kuznetsov's interest in the assets of PSM and in addition, enabled an unjustified confessed judgment to be entered of record against Kuznetsov in the sum of about $540,000 for his alleged failure to repay the loan as required by paragraph 1 of the surety agreement.

8. As a consequence of the Bank's breech of contract and other misconduct Kuznetsov could not recover his court settlement with PSM, either in collateral or cash and sustained a loss of millions of dollars caused by the Bank.

WHEREFORE, Plaintiff requests judgment be entered against the Bank for compensatory and punitive damages.

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Pa.Id. 12313
Attorney for Plaintiff
9800B McKnight Road
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Phone 412-366-6200
E-mail: clifford@cliffordpoff.com

EXHIBIT 1 EXCERPT

In part, the Surety Agreement and Guaranty contract provided:

* * *

. . . the undersigned, and if more than one, each of them jointly and severally, hereby becomes surety for and irrevocably and unconditionally guaranties to Bank the full and punctual payment when due (whether on demand, at stated maturity, by acceleration, or otherwise and including any amounts which would become due but for the operation of an automatic stay under the federal bankruptcy code or any similar laws) of any and all present and future liabilities, indebtedness, and obligations of Borrower to Bank, however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, sole, with another, joint or several, due or to become due, secured or unsecured, contracted or acquired, written or oral, and whether as maker, drawer, endorser, guarantor, surety, or otherwise, whether rising in the ordinary course of business or otherwise, and any and all renewals, extensions, restatements, substitutions, modifications, consolidations, amendments, continuations, and the like of any of the foregoing, together with any and all interest (including, without limitation, interest which, but for the filing of a petition in bankruptcy by or against Borrower, would accrue on any of the foregoing), late charges, fees, costs, and expenses (including attorneys' fees and costs) arising from or relating to any of the foregoing or the collection or enforcement thereof (all of the

foregoing of which shall be referred to herein as the "Liabilities" and any of the foregoing as a "Liability."

1. If Borrower at any time fails to fully and punctually pay or perform any of the Liabilities when due the undersigned promises, jointly and severally, to pay and perform all such Liabilities immediately. (Emphasis supplied.)

* * *

APPENDIX F

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 134 WDA 2004

STEPHEN B. KUZNETSOV, Appellant	)
V	)
JOSEPH KOVALCHICK, KOVALCHICK CORPORATION AND NATIONAL CITY BANK, A CORPORATION OF PENNSYLVANIA, Appellees.	)

Appeal from the Order entered in the Court of Common Pleas of Allegheny County, Civil Division, No(s): GD 01-3277

BEFORE: FORD ELLIOTT, ORIE MELVIN and TAMILIA, JJ.

J. A03036705

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MEMORANDUM: FILED: May 19, 2005

EXCERPT FROM PAGE 14

. . . None of the authorities upon which appellant relies support his contrary position that he had a right to pay the debt.

In conducting our review, we have assessed the record in the light most favorable to Bank as the non-moving party. We find no abuse of discretion or error of law. (emphasis supplied)

Order affirmed.
Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: May 19, 2005

APPENDIX G

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 134 WDA 2004

STEPHEN B. KUZNETSOV, Appellant, v. JOSEPH KOVALCHICK, KOVALCHICK CORPORATION AND NATIONAL CITY BANK, A CORPORATION OF PENNSYLVANIA, Appellees.	)

Appeal from the Order of December 26, 2003 issued by Allegheny County Common Pleas Court Judge Alan S. Penkower in Civil Action No. GD 01-3277, Stephen B. Kuznetsov v. National City Bank of Pennsylvania

Excerpt at Pages 12 and 13 from
"Summary of the Argument"

Except for Creeger Judge Penkower cited no case law to support his reasoning and since receiving Judge Penkower's opinion, further research has identified case decisions right on point as far back as 1859 that support Kuznetsov's argument

that a surety has the right to pay the debt following the borrowers default:

* * *

> . . . the relation of principal and surety is one involving the utmost good faith and confidence; and it is the duty of the principal and the creditor to carefully consider and protect the rights of the surety, in all their transactions relating to the debt; . . .
>
> * * *
>
> A surety may, at any time, pay the debt to the creditor, and sue his principal at once, to reimburse himself. . .
>
> * * *
>
> A surety has always the right to pay the debt of the principal, and when he does so, he becomes entitled to be subrogated to all rights of the creditor. . .
>
> * * *

Willis v. Davis 3 Minn. 17; 1859 Minn.

Willis v. Davis has not been overruled or distinguished and has been cited a number of times in Minnesota and in other jurisdictions. And, in Pennsylvania, since 1879, the law has been to the same effect. See, Smith v. Harry 91 Pa. 119, 123 (1879):

> That decree established the executor's personal responsibility and it was his duty to make immediate

payment. It fixed the liability of his sureties for an absolute debt, a sum certain, for which there was then a present right of action against them; and they were not obligated to wait til after the legalese formally demanded the money, or issued process for its collection, before moving to protect themselves . . . and neither reason nor law required them to suffer the debt to become swollen by interest and costs, before they paid it, on pain of being treated as mere volunteers. . . . (Emphasis supplied.)

* * *

APPENDIX H

91 Pa. 119

Smith and. Kausler versus Harry.

H., who was an executor, gave to his sureties a mortgage to indemnify them against "all loss, cost, damage and expense which they could or might be put to by reason of their being securities on his bond." H. filed his account, showing a balance of $2000 in his hands. The court approved the account and ordered the fund to be distributed. H. at this time was insolvent, and one of the sureties advanced the money to pay the legacies. These payments were made before suit brought or before any demand was made upon the sureties by the legatees. The court below held that said mortgage was not an indemnity against mere liability, but against loss, cost, damage and expense, and that the mortgagees could not voluntarily and without demand upon them, convert their liability into loss, but only after proceedings *in invilum*. Held, that this was error; that the decree of the court approving the account, fixed the liability of the sureties for an absolute debt, a sum certain, for which there was then a present right of action; and that they were not obliged to wait until after the legatees formally demanded the money, or issued process for its collection, before moving to protect themselves; that the plaintiffs' rights as sureties were not waived by taking an indemnity such as this mortgage, and that they were entitled to all the advantage of said security.

June 19th 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY and STERRETT, JJ. WOODWARD, J., absent.

Error to the Court of Common Pleas, of *Franklin county*: Of May Term 1879, No. 216.

Arguments of counsel omitted

Scire facias sur mortgage issued by George W. Smith and John H. Kausler against J K. Harry.

Mr. Justice TRUNKEY delivered the opinion of the court, October 6th 1879.

The defendant concedes that the decree of the Orphans' Court approving the executor's account and making distribution, was all that was necessary as prerequisite to a suit on the bond. That decree established the executor's personal responsibility and it was his duty to make immediate payment. It fixed the liability of his sureties for an absolute debt, a sum certain, for which there was then a present right of action against them; and they were not obliged to wait till after the legatees formally demanded the money, or issued process for its collection, before moving to protect themselves. ["Harry had no means wherewith to pay the said distribution" and neither reason nor law required them to suffer the debt to become swollen by interest and costs, before they paid it, on pain of being treated as mere volunteers. Their liability had risen because of the principal debtor's default, and the law implies that he requested them to pay the money. Where a surety pays an overdue debt, he can recover what he pays from the principal debtor, who will be

considered as having requested him to pay the debt in receiving him as his surety: 1 Par. Con. 893.

In equity, as soon as the surety pays the debt, he is considered as subrogated to all the remedies of the creditor against the person and estate of the principal. In some cases, without payment, a surety, apprehending danger from the delay of the creditor, may compel him to sue the principal debtor on giving an indemnity against the consequences of risk and expense. A surety may file a bill in equity against the principal to compel him to pay the debt at maturity, and make the creditor a party in order that he be at hand to receive the money. In an early case it was said: "Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable, the court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him:" Renelaugh *v.* Hays, 1 Vern. 188; 1 Story's Eq., sect. 327; 1 L. C. Eq. 144; 3 Id. 557; Hays *v.* Ward, 4 Johns. Ch. 128; Beaver *v.* Beaver, 11 Harris 169.

When the executor made default in payment to the legatees, according to the decree of the Orphans' Court, well settled principles authorized his sureties at once to commence proceedings to compel him to pay the debt, or themselves could pay it, as they did, and recover the money from him. The mortgage contains no express or implied contract depriving the mortgagees, as sureties, of any remedies against the mortgagor, as principal. Both on its face and in its circumstances it was a security to the sureties against "all loss, cost, damage and expense which they could or might be put to by reason of their being sureties on said bond." Upon the executor's default in complying with the said decree, they could have been put to damage and expense; they were legally bound to pay the debt, and had a right to discharge it and

avail themselves of the security. The mortgagor has no color of defense. Was not that recorded mortgage notice to a subsequent purchaser or creditor? He could see that the land was pledged to save harmless the sureties on an executor's bond fully recited in the mortgage. He is presumed to have known the extent of their liability, and that, upon the executor's default, it would become the sureties' duty to pay the money according to the adjudication of the Orphans' Court. The facts show no superior equity in favor of a subsequent creditor.

This case differs widely from Crippen *v.* Thompson and Bishop, 6 Barb. 532, cited by the below. There the action was on a bond, given to Crippen by Thompson as principal and Bishop as surety; conditioned that Thompson should "save harmless the said" Crippen "from a bond executed by him to Nathan R. Crippen, deceased, dated on or about the 3d day of March 1840, the said Crippen giving the said Thompson notice of any proceedings at law or otherwise thereon." That bond was to pay the debts of' Crippen, Sr., the plaintiff's father. After it was given and before the defendants gave their bond, the plaintiff agreed with Dayton to pay him a debt owing by the father, making himself directly liable for it and thereby precluding all examination and defense as to that debt. The court, in the opinion, said: "The question in this case, as we shall see, is whether the plaintiff can pay the debt of his father, voluntarily and without notice and then recover upon the bond, against him and his surety?" It was held he could not. Here the mortgagor was the principal debtor, had his day in court, with opportunity to test the legality of the claim ; and after final decree and his default, his sureties, the mortgagees, actually paid the debt, before commencing proceedings on the mortgage. The doctrine in Crippen *v.* Thompson, if sound, does not apply.

The plaintiffs had rights as sureties which were not waived by taking an indemnity against "loss, cost, damage and expense," and having suffered loss, by reason of their suretyship, are entitled to advantage of their security.

Judgment reversed and a new trial ordered.